JOINT EMPLOYMENT AND THE NLRB:
FRANCHISORS, STAFFING AGENCIES AND
CHANGING DEFINITIONS FOR ALL EMPLOYERS

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There are currently two pending cases which have drawn significant attention on the issue of joint employment status.

Beginning in 2012, employees of McDonald’s franchises began filing unfair labor practice charges. The NLRB has made merit determinations in over 100 of those cases. The allegations include discriminatory discipline, reductions in hours, discharges, and other coercive conduct allegedly directed at employees who may have been involved in Union and other protected concerted activities.

The NLRB has concluded that McDonald’s USA, LLC uses its franchise relationship, franchise agreement, tools, resources, and technology to an extent that, according to the NLRB, McDonald’s USA, LLC exercises sufficient control to make it a joint employer with its franchisee.

At the present time, there are 19 complaints involving 101 charges against McDonald’s USA, LLC, McDonald’s USA franchisees and/or McDonald’s franchisees and their franchisor, McDonald’s USA, LLC, as joint employers. Complaints are pending in the following regions and subregions: New York City, Philadelphia, Detroit, Atlanta, Chicago, St. Louis, Kansas City, New Orleans, Minneapolis, San Francisco, Indianapolis, Phoenix, Los Angeles, and Pittsburgh. The NLRB has scheduled consolidated hearings in three regional locations. The consolidated hearings commenced on March 30, 2015 in New York City. Additional hearings will be held in Chicago and Los Angeles.
The other case drawing significant attention at this time is Browning-Ferris Industries of California, Inc., et al. v. Sanitary Truck Drivers & Helpers Local 350, International Brotherhood of Teamsters.¹

Although the NLRB has not yet promulgated the new standard, features of the “industrial realities” test can be gleaned from two primary sources. The amicus brief of NLRB General Counsel Richard F. Griffin in the Browning-Ferris matter advocates a return to a pre-1984 approach under which an “... entity was a joint employer where it exercised direct or indirect control over the significant terms and conditions of employment of another entity’s employees, where it possessed the unexercised intentional control of such terms and conditions of employment, or where ‘industrial realities’ otherwise made it an essential party to meaningful collective bargaining.”

Former NLRB Chair Wilma B. Liebman previously proposed the adoption of a test that would assess the degree of “economic dependence” between companies. She said the focus should not be whether a company exercises control through “hiring, firing, discipline, supervision and direction of another company’s employees.” She advocated a test which analyzes whether the company imposes its own operational requirements, monitors those requirements, and retains effective control over operations of another company. These developments have received the most attention in the franchise or franchisee context. However, this is far from the only application of these possible changes. Among the other contexts in which these changes may have effect on business practices are temporary staffing agencies, employee leasing agencies, employment

recruiters, subcontracted employees, private equity funds with board participation, successor companies, and companies involved in supply chains.

The focus of the Browning-Ferris case is an NLRB Regional Director’s determination that only independent staffing company employees were eligible to vote in a representation election at a recycling plant. Regular plant employees were prohibited from voting. The Regional Director determined that the staffing company was the sole employer.

The McDonald’s cases also have a significant Union organizing component. However, a change in the joint employer standard is likely to have effect with respect to a wide variety of employer exposures, including, but not limited to, Workers’ Compensation, family and medical leave act, Fair Labor Standards Act, OSHA, age discrimination in employment Act, withholding and payroll issues, and Unemployment claims.

While this area is in a state of flux at the moment, there are well established standards that have been applied to date. Some of those standards continue to be applied, especially at the State level, notwithstanding changes that may occur.

The following is a survey of Supreme Court, Circuit Court, District Court and State Court Decisions regarding Joint Employment, primarily in the franchisor/franchisee situation.

1. **Supreme Court of the United States**

   Currently, economic realities determine whether an entity is the employer of an employee.\(^2\) The Court reasoned that the relationship needs to be determined by looking

at the circumstances, not just applying factors.\textsuperscript{3} Currently, the “economic realities” test is applied by all circuits

2. Federal Circuits

A. Second Circuit

I. General Rule

The Second Circuit evaluates the authority to hire, fire, and discipline, control over pay and insurance, and supervision, to decide whether an entity, which is no the nominal employer, may be a joint employer to an employee.\textsuperscript{4}

In \textit{Arculeo v. On-Site Sales}\textsuperscript{5}, the court held that the previous employer was not the joint employer of former employees now employed by a new company. This case relies heavily on the analysis from \textit{Clinton’s Ditch}. The court evaluated several factors in reaching its determination:

a) although the new company inherited their workforce from the previous employer, the new employer had the power to hire and fire employees;

b) the former “employer need not mutely suffer an incompetence or misbehavior of its subcontractor’s employees (formerly its employees) in order to avoid status as a joint employer.”;

c) with regard to providing benefits to the employees, the previous employer only provided significant benefits to the employees during the first three months of the contract with the current employer, and after the benefits were small, such as providing turkey

\textsuperscript{3}Id., 331 U.S. at 730.

\textsuperscript{4}\textit{Clinton’s Ditch Co-Op, Inc. v. N.L.R.B.}, 778 F.2d 132 (2d Cir. 1985).

\textsuperscript{5}\textit{Arculeo v. On-Site Sales}, 425 F.3d 193, 202-03 (2d Cir. 2005).
dinners, sodas, a clambake, etc., The fact that these smaller benefits occurred during three out of four years on the contract has little significance. In addition, the previous employer provided those same minor benefits to other individuals. “De minimus benefits are insignificant in analyzing joint employer status.”;

d) the finding of supervision by the previous employer over the current employer’s drivers does not tend to support a finding of joint employer status, but this factor is not determinative; and

e) In regards to the collective bargaining process, the previous employer’s involvement was not significant enough to conclude they had any participation in the collective bargaining process, although there was evidence that the current employer had to consult with the previous employer during the process and the previous employer did apply some pressure to include a particular clause within the agreement. “Absent evidence that more extensive consultations about the bargaining agreement actually occurred, there is no basis for concluding that [the previous employer] controlled or manipulated the bargaining to an extent indicative of joint employer status.”

The Second Circuit determined that there are no determinative factors to determine whether joint employer status exists. The court will determine the appropriate factors based on the circumstances surrounding the employment.

II. Title IV

For Title IV purposes, there is a four-part test to determine “when a parent company ... may be considered the employer of its subsidiary’s employees.” A parent and

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subsidiary cannot be found to be joint employers in the absence of evidence of: “1) interrelation of operations, 2) centralized control of labor relations, 3) common management, and 4) common ownership or financial control.” No one of these factors is determinative; however, control of labor relations is the central concern when weighing the factors.

In determining whether there is adequate control over labor relations the question is, “what entity made the final decisions regarding employment matters related to the person claiming discrimination?” The court refers to Cook v. Arrowsmith Shelbourne, Inc. to explain this issue. In Cook, the court held that the parent had the requisite level of control over the subsidiary to constitute being a joint employer because: “a) the parent processed applications for employment for the subsidiary and approved personnel status reports; b) the subsidiary cleared all major employment decisions with the parent; and c) the plaintiff was hired and fired by employees of the parent.”

Total control is not necessary. To satisfy the single-employer test, a plaintiff need not allege that the parent exercises “total control or ultimate authority over hiring decisions,”

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7 Id. At 226.
8 Id.
9 Id.
10 Cook v. Arrowsmith Shelbourne, Inc., 69 F.3d 1235 (2d Cir. 1995).
11 Id.
12 Id.
so long as he alleges that there is “an amount of participation [by the parent] that is sufficient and necessary to the total employment process.”\textsuperscript{13}

The Second Circuit handles the issue of Title VII joint liability similarly. The main consideration is the level of control in relation to the factual circumstances. In other words, under this theory, to be liable, the franchisor would: 1) have to have the requisite control over the employee, and 2) the franchisor needs to make their decision based on some type of discrimination or action to violate Title VII.

\textit{III. FLSA}

With regard to the Fair Labor Standards Act, the Second Circuit has adopted factors which are all based on the Supreme Court’s creation of the “economic realities standard.”\textsuperscript{14} “The Second Circuit has treated employment for FLSA purposes as a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances ... [and] we have identified different sets of relevant factors based on the factual challenges posed by particular cases.”\textsuperscript{15}

1) The Second Circuit has referred to three sets of factors: Brock factors\textsuperscript{16}; “1) the degree of control exercised by the employer over the workers, 2) the workers’ opportunity for profit or loss and their investment in the business, 3) the degree of skill and independent initiative required to perform the work, 4) the performance or duration of the

\textsuperscript{13} \textit{Id}.

\textsuperscript{14} \textit{Barfield v. New York City Health and Hospitals Corp,}, 537 F.3d 132 (2d Cir. 2008).

\textsuperscript{15} \textit{Barfield}, 537 F.3d at 137.

\textsuperscript{16} \textit{Brock v. Superior Care, Inc.}, 840 F.2d 1054.
working relationship, and 5) the extent to which the work is an integral part of the employer’s business.”

2) The Carter factors from Carter v. Dutchess Community College\textsuperscript{18}; “whether the alleged employer 1) had the power to hire and fire the employees, 2) supervised and controlled employee work schedules or conditions of employment, 3) determined the rate and method of payment, and 4) maintained employment records.”\textsuperscript{19}

3) The Zheng factors from Zheng v. Liberty Apparel Co., Inc.\textsuperscript{20}; “1) whether Liberty’s premises and equipment were used for the plaintiff’s work; 2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; 3) the extent to which plaintiffs performed a discrete line-job that was integral to Liberty’s process of production; 4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; 5) the degree to which the Liberty Defendants or their agents supervised plaintiff’s work; and 6) whether plaintiffs worked exclusively or predominately for the Liberty Defendants.”\textsuperscript{21}

B. Third Circuit.

I. FLSA

\footnotesize{\textsuperscript{17}Barfield, 537 F.3d at 142.  
\textsuperscript{18}Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir. 1984).  
\textsuperscript{19}Barfield, 537 F.3d at 142.  
\textsuperscript{20}Zheng v. Liberty Apparel Co., Inc., 355 F.3d 61 (2d Cir. 2003).  
\textsuperscript{21}Barfield, 537 F.3d at 146.}
“The best concept to determine whether someone is an employee under the FLSA is economic reality.”\textsuperscript{22} In addition to the economic reality test developed by the Supreme Court, the Third Circuit looks to the NLRB to determine the issue of joint employers.\textsuperscript{23}

In Enterprise, the court held that where two or more employers exert significant control over the same employees, they constitute joint employers under FLSA. \textit{Id}. "A determination as to whether a defendant is a joint employer must be based on a consideration of the total employment situation and the economic realities of the work relationship."\textsuperscript{24}

The court developed the “Enterprise Factors” by combining the holdings in \textit{Bonnette v. California Health & Welfare Agency}\textsuperscript{25} and \textit{Lewis v. Vollmer of America}\textsuperscript{26}, “1) the alleged employer’s authority to hire and fire the relevant employees; 2) the alleged employer’s authority to promulgate work rules and assignments and to set the employees’ conditions of employment: compensation, benefits, and work schedules, including the rate and method of payment; 3) the alleged employer’s involvement in day-to-day employee supervision, including employee supervision, including employee discipline; and 4) the alleged employer’s actual control of employee records, such as payroll, insurance, or taxes."\textsuperscript{27} The

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\textsuperscript{22}In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation, 683 F.3d 462, 467 (3d Cir. 2012).
\textsuperscript{23}In re Enterprise, 683 F.3d at 468.
\textsuperscript{24}Id. at 469.
\textsuperscript{25}Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983).
\textsuperscript{27}Id. At 469.
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court added, “these factors are not exhaustive and not the sole considerations necessary to determine employment.”

C. Fourth Circuit

I. FLSA

The Fourth Circuit has adopted the “Silk Factors” derived from United States v. Silk. The “Silk Factors” are: “(1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker’s opportunities for profit or loss dependent on his managerial skills; (3) the worker’s investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer’s business.”

D. Fifth Circuit

I. FLSA

In Orozco v. Plackis, the court held that the franchisor was not a joint employer of the employee. The court based their decision on an application of factors which were derived from the “economic realities” test: “whether the alleged employer: (1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment,

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28 Id.


31 Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014).
and (4) maintained employment records. “Each element need not be present in every case.”

The court reasoned that although the franchisor trained and gave some instruction to the employee that could hire and fire employees that does not mean that they possessed the power to hire and fire the employees.

With regard to the second element, the court held that, although the manager made changes after she met with the franchisor, the franchisor reviewed the employees work schedules, trained the manager and the particular employee, the employee stayed at the restaurant until a direct employee of the franchisor showed up, the franchisor frequently visited the franchisee and spoke with managers, the managers would relay messages directly from the franchisor to the employees, and the franchisor would email the franchises on how to improve their business, the franchisor did not supervise and control the employees work schedules and conditions of employment.

The court reasoned that the best evidence provided was the meetings between the franchisor and the manager; however, these meetings do not prove that the franchisor had the authority to supervise or control the employee work schedule or conditions of their employment. The jury should not be able to reasonably infer the satisfaction of the

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32Orozco, 757 F.3d at 448.

33Id. at 449.

34Id. at 450.

35Id.

36Id.
second factor based on this evidence. 37 “The mere fact that [the franchisor] reviewed the schedules fails to demonstrate he actually had control over [the employee’s] schedule or employment conditions.”38

Additionally, just because the franchisor trained the manager in the location at issue does not mean that the franchisor supervised or controlled the employees in that location, it is reasonable to believe that a franchisor would provide training to a new franchisee and its employees.39 Finally, the franchisor emailing all of the franchisees only reveals that the franchisor set broad policies for the entire franchise and provided assistance to the franchises.40

The court held that the third factor was not satisfied.41 The employee’s chief argument was that the franchisor controlled his rate and method of payment because he was aware of the salary.42 The court held that the jury would not be able to reasonably infer this based on that evidence.43

The court does not directly address the fourth factor: instead, it addresses the franchise agreement itself.44 “[Part of the agreement] demonstrates that [the franchisor]...”
has at least a certain degree of control over the ... location."\textsuperscript{45} However, this franchise agreement, alone, is not enough to conclude that the franchisor was the employee under the FLSA.\textsuperscript{46}

This is a recent case that deals directly with a situation. The application of the factors clearly favored the franchisor. It remains to be seen whether this case will stand alone or represent a trend in joint employer liability.

E. Sixth Circuit

1. Title VII

The Sixth Circuit applies a joint employment test which is very similar to that used in \textit{Orozco} when deciding if a company is a joint employer over an employee.\textsuperscript{47} In \textit{Sanford}, the court held that the defendant was a joint employer over the employee along with the plaintiff’s original company.\textsuperscript{48} The court applied the following factors to support their holding: "(1) the Manor had the authority to hire, fire, and discipline the Southeastern employee; (2) the Manor could affect the Southeastern employee’s compensation or employment benefits; and (3) the degree to which the Manor's management supervised the Southeastern employee, including directing the employee’s schedule and daily assignments, and any other pertinent factors."\textsuperscript{49}

F. Seventh Circuit

\textsuperscript{45}Id. at 452.

\textsuperscript{46}Id.

\textsuperscript{47}Sanford v. Main Street Baptist Church Manor, Inc. 449 Fed. Appx. 488 (6th Cir. 2011).

\textsuperscript{48}Id.

\textsuperscript{49}449 Fed. Appx. 488.
I. FLSA

The Seventh Circuit does not lay out specific factors for joint employment in the FLSA context. Instead, they look to the holding in Rutherford and apply that holding to the circumstances in a specific case. In Reyes v. Remington Hybrid Seed Co., Inc., Zarate hired Reyes. Zarate supplied workers to Remington. The court held that Remington was a joint employer under the FLSA. The court reasoned that “Zarate had no business organization that he could shift from one place to another; he put together a crew for Remington alone. Zarate's workers took instruction from him but followed work rules that Remington laid down. They started at Remington’s headquarters with a briefing about pesticide safety. Remington supplied the tools (and the outhouses). Remington posted supervisors in the fields to inspect the work and tell the crew when the job had to be re-done.”

II. Family and Medical Leave Act

This Court uses the same analysis for FMLA as they do for FLSA cases. The court referred back to its ruling in Reyes and determined that case based on their previous ruling. “We hold generally that for a joint-employer relationship to exist, each alleged employer must exercise control over the working conditions of the employee, although the ultimate determination will vary depending on the specific facts of each case.”

50 Reyes v. Remington Hybrid Seed Co., Inc., 495 F.3d 403 (7th Cir. 2008).
51 Reyes, 495 F.3d at 408.
52 Moldenhauer v. Tazewell-Peken Consol. Communications Center, 536 F.3d 640 (7th Cir. 2008).
53 Moldenhauer, 536 F.3d at 644.
regulation in the FLSA mirrors that in the FMLA ... and thus it makes sense for us to use this standard to govern the FMLA."\(^{54}\)

G. Ninth Circuit

I. FLSA - FMLA

The controlling joint employer case in this circuit deals with the FMLA. However, as with the 7\(^{th}\) Circuit, the court holds that the same standard will apply in an FLSA case.\(^{55}\) The 9\(^{th}\) Circuit applies the following factors: “whether the alleged employer 1) had the power to hire and fire employees, 2) supervised and controlled employee work schedules or conditions of payment, 3) determined rate and method of payment, and 4) maintained employment records.”\(^{56}\) These factors derived from the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).\(^{57}\)

In addition to these factors, the court identifies “non-regulatory” factors to use: “1) whether the work was a specialty job on the production line; 2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes; 3) whether the premises and equipment of the employer are used for the work; 4) whether the employees had a business organization that could or did shift as a unit from one work site to another; 5) whether the work was piecework and not work that required initiative, judgment or foresight; 6) whether the employee had an opportunity for profit or loss depending upon the alleged employees’

\(^{54}\)Id.

\(^{55}\)Moreau v. Air France, 356 F.3d 942, 945 (9\(^{th}\) Cir. 2003).

\(^{56}\)Moreau, 356 F.3d at 946-47.

\(^{57}\)Id. at 947.
managerial skills; 7) whether there was permanence in the working relationships; and 8) whether the service rendered is an integral part of the alleged employer’s business.”58

H. Tenth Circuit

I. Title VII

“An independent entity with sufficient control over the terms and conditions of the employment of a worker formally employed by another is a joint employer within the scope of Title VII.59 In Knitter, the court held that the employer was not a joint employer.60 The court based its holding on the following factors: “1) Picerne did not have the authority to terminate Ms. Knitter’s employment; 2) Picerne did not pay Ms. Knitter directly; and 3) Picerne did not have authority to supervise and discipline Ms. Knitter beyond the confines of a vendor-client relationship.”61

3. United States District Courts

A. Arizona

“A franchisor is not a joint employer unless it has significant control over the employment relationship.”62 “Vicarious liability attaches ... if the franchisor exerts daily control over the hiring, firing, and supervision of franchisee employees.”63

58Id. at 947-48.

59Knitter v. Corvias Military Living, LLC, 758 F.3d 1214, 1226 (10th Cir. 2014).

60758 F.3d at 1226.

61Id. at 1228.

62Courtland v. GCEP-Surprise, LLC, 119 Fair Empl. Prac. Case 806, 5.

63Id.
supervision does not necessarily extend to control over an instrumentality of franchisee
harm. 64

In Courtland, the court held that the franchisor could not be held vicariously liable.65
The court reasoned that the franchisor: 1) did not have control over the daily conduct of the
managerial staff; 2) trained the managerial staff, but with respect to duties that did not
relate to the supervision of employees; and 3) did not monitor whether the managers
complied with employment laws or how they supervised their employees.

B. California

“Employer is defined as any person who directly or indirectly, or through an agent
or any other person, employs or exercises control over the wages, hours, or working
conditions of any person.”66

In Vann, the court held that the franchisor was not the employer, or joint employer,
of the employee. The court reasoned that there was no uniformity in the compensation
system franchises, so the franchisor could not have set a payment standard. The franchise
agreement stated that the franchisees possess the power to hire and fire. Even though the
franchisor created the employment manual, the franchisor did not implement any workplace
policies while the employee worked there.

C. Maryland

“To determine whether an entity is a joint employer, a court must take into account
the real economic relationship between the employee, employer, and putative joint

64 Id.
65 Id. at 8.
The four factors applied to determine that are: “1) authority to hire and fire employee; 2) authority to supervise and control work schedules or employment conditions; 3) authority to determine the rate and method of payment; and 4) maintenance of employment records.”

Although Comcast played a role in hiring and firing the technicians, that was only done in the context of “quality control.” Additionally, the control that Comcast displayed was to protect their own customers, not to form a relationship with the technicians. Although Comcast controlled the wages of the technicians, it did not issue pay checks, pay stubs, W-2’s, and the technicians did not submit timesheets to Comcast. Comcast did maintain records, but it only did so as part of its quality control procedures.

D. Oregon

“[A] franchisor may be held vicariously liable under an agency theory for intentional acts of discrimination by employees of a franchisee.” “An agency relationship may be evidenced by an express agreement between the parties, or it may be implied from the

68 Jacobson, 740 F.Supp.2d at 688.
69 Id. at 689.
70 Id.
71 Id. at 692.
72 Id.
circumstances and conduct of the parties ... [I]t does not matter whether the putative principal actually exercises control; what is important is that it has the right to do so.”

E. Tennessee

“The predominate test for holding a franchisor liable for the tortuous conduct of its franchisee is whether the franchisor controls or has the right to control the daily conduct or operation of the particular instrumentality or aspect of the franchisee’s business that is alleged to have caused the harm.”

In Gray, the court held that McDonald’s could not be held vicariously liable for the franchisee’s negligence. The court reasoned that, because there was no evidence that McDonald’s had control over the hiring, firing, or discipline of the employee, they could not be liable for his actions.

4. State Courts

A. Alabama

Alabama has specifically dealt with the issue of franchisor liability to a franchisee employee. The court held that Domino’s Pizza was a joint employer over their franchisee’s employee. The court looked to evidence provided, including the franchise

74 Miller, 31 F.Supp.2d at 806.
76 874 F.Supp.2d at 752.
77 Id.
78 Domino’s Pizza, Inc. v. Casey, 611 So.2d 377 (August 14, 1992).
79 611 So.2d at 379.
agreement, to make their decision.\textsuperscript{80} While the court considered the franchise agreement, but placed greater reliance on trial evidence to gain insight into the relationship between Domino’s and its franchisee.\textsuperscript{81}

The court noted that: “a Domino’s representative made periodic, usually monthly, checks to the store ... [i]f an employee was not in compliance with the rules set forth in the Domino’s manual, that employee would be given a written warning by a Domino’s representative ... [a] Domino’s representative told [the employee] that if she received a written warning more than three times, she would automatically be terminated.”\textsuperscript{82} Additionally, “[the employee] was hired by the store manager ... who received his training from Domino’s ... [the manager] trained [the employee] according to the Domino’s manual.”\textsuperscript{Id.} The employee in this case also wore a Domino’s shirt, name tag, and hat, she had a Domino’s car sign, Domino’s set the guidelines for the deliveries, and Domino’s delivered stock to the store.\textsuperscript{83}

B. California

“A franchisor ... becomes potentially liable for actions of the franchisee’s employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee’s employees.”\textsuperscript{84}

\textsuperscript{80}Id.

\textsuperscript{81}Id.

\textsuperscript{82}Id. at 378.

\textsuperscript{83}Id.

\textsuperscript{84}Patterson v. Domino’s Pizza, LLC, 60 Cal. 4th 474, 497-98.
In Patterson, the court held that Domino’s could not be held liable for the actions of its franchise employee.\textsuperscript{85} The court reasoned that the agreement did not allow for the franchisor to control the franchisee’s employees, that the franchise agreed to act as an independent contractor, that the franchisee agreed their employees were their own and not Domino’s, and that the agreement did not allow Domino’s to direct the franchisee employees in their daily operations.\textsuperscript{86} In addition to the agreement, Domino’s did not have the power to enact a sexual harassment policy for the store, Domino’s could not manage the behavior of the franchise employees, Domino’s did not participate in the hiring process, Domino’s was not responsible for training and Domino’s could not monitor sexual harassment complaints.

C. Georgia

“In order to impose liability on the franchisor for obligations of the franchisee, it must be shown that: (a) the franchisor has by some act or conduct obligated itself to pay the debts of the franchisee; or (b) the franchisee is not a franchisee in fact but a mere agent or alter ego of the franchisor.”\textsuperscript{87} To satisfy (b) the court looks at whether the contract gives, or the franchisor assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract.\textsuperscript{88}

\textsuperscript{85}60 Cal. 4\textsuperscript{th} at 499.

\textsuperscript{86}Id. at 500.

\textsuperscript{87}Schlotzsky’s, Inc. v. Hyde, 245 Ga. App. 888-89.

\textsuperscript{88}Schlotzsky’s, 245 Ga. App. At 889.
In *Schlotzsky*, the court held that the franchisor should not be held vicariously liable.\(^8\) The court reasoned that “a franchisor may protect its franchise and its trade name by setting standards governing its franchisee’s operations, including how its product is manufactured, packaged, prepared, or served.\(^9\) Here, there was no evidence that the franchisor controlled the day-to-day activities of its franchise, and the agreement did not state that the franchisor had this power.

D. Idaho

“A franchisor may be held vicariously liable for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee’s business that is alleged to have caused the harm.”\(^91\) The court held that the franchisor could not be held liable for the acts of its franchisee.\(^92\) The court relied solely on the franchise manual to reach its decision.

E. Iowa

“[T]he [c]ourt must look to whether or not an employer who entrusts work to an independent contractor retains control of any part of the work or workplace which would subject the employer to a duty to exercise reasonable care.”\(^93\)

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\(^8\) Id. at 563.

\(^9\) Id.

\(^91\) *Ketterling v. Burger King Corp.*, 152 Idaho 555, 561.

\(^92\) 152 Idaho at 561.

\(^93\) *Hoffnagle v. McDonalds Corp.*, 522 N.W. 2d 808,813.
In Hoffnagle, the court held that McDonald’s did not retain sufficient control over the operations of the franchisee to owe a duty to the franchise employee. The court reasoned that the franchisee had the power to control the details of the restaurant’s day-to-day operation because the franchisee owned the business equipment, operated the business, held the operating licenses and permits, determined the wages, provided the basic daily training and insurance for the employees, hired, fired, supervised, and disciplined the employees. McDonald’s had the power to require the franchisee to comply with McDonald’s system, adopt and use its manuals, and follow general guidelines provided by McDonald’s. McDonald’s authority is no more than the authority to insure the uniformity and standardization of products and services offered by a franchisor’s restaurant ... such obligations do not affect the control of its daily operations.

F. Maine

This state applies the “traditional test” to franchise liability, which “allows a franchisor to regulate the uniformity and the standardization of products and services without risking the imposition of vicarious liability.” If a franchisor takes further measures to reserve control over a franchisee’s performance of its day-to-day operations, however, the franchisor is no longer merely protecting its mark, and imposing vicarious liability may be appropriate.

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94 Hoffnagle, 522 N.W. 2d at 813.
95 Id.
96 Id.
97 Rainey v. Langen, 998 A.2d 342, 349.
98 Rainey, 998 A.2d at 349.
G. Massachusetts

This state applies the right to control the specific instrumentality of the harm rule that is applied in other jurisdictions.\(^9^9\)

H. Michigan

“A franchisor must have the right to control the day-to-day operations of a franchisee in order to establish an agency relationship.”\(^1^0^0\)

I. Mississippi

To determine whether a party is the master of the other the court looks at: “1) whether the principal master has the power to terminate the contract at will; 2) whether he has the power to fix the price in payment for the work, or vitally controls the manner and time of payment; 3) whether he furnishes the means and appliances for the work; 4) whether he has control of the premises; 5) whether he furnishes the material upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect of the output; 6) whether he has the right to prescribe and furnish the details of the kind and character of work to be done; 7) whether he had the right to supervise and inspect the work during the course of the employment; 8) whether he had the right to direct the details of the manner in which the work is to be done; 9) whether he had the right to employ and discharge the subemployees and to fix their compensation; and 10) whether he is obliged to pay the wages of said employees.”\(^1^0^1\)

J. New York


\(^1^0^1\)Parmenter v. J&B Enterprises, Inc., 99 So.3d 207, 214.
In determining whether a franchisor may be vicariously liable for the acts of its franchisee, the most significant factor is the degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred.\textsuperscript{102}

K. North Carolina

“A franchisor is vicariously liable for the tortious acts of its franchisee when an agency relationship exists and the acts are committed within the scope of the agent’s authority.”\textsuperscript{103}

L. Ohio

“Generally, a franchisor is not liable for the acts of its franchisee unless an agency relationship exists.”\textsuperscript{104} This relationship can be established where the franchisor has a vested right to control the franchisee’s actions.\textsuperscript{105}

M. Oregon

“The test for determining whether an agent is an employee is predominately driven by the ‘extent to which the purported employer has the right to control the performance of services by the individual.”\textsuperscript{106} The main test is control, but there are other factors that may be considered: “1) a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services


\textsuperscript{103} Miller ex rel. Bailey v. Piedmont Steam Co., Inc., 137 N.C. App. 520, 524.

\textsuperscript{104} Starks v. Choice Hotels Internatl., 175 Ohio App. 3d 510, 513.

\textsuperscript{105} Starks, 175 Ohio App. 3d at 513.

\textsuperscript{106} Viado v. Domino’s Pizza, LLC, 230 Or. App. 531, 546 (2009).
in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control; 2) in determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: a) the extent of control which, by the agreement, the master may exercise over the details of the work; b) whether or not the one employed is engaged in a distinct occupation or business; c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; d) the skills required in the particular occupation; e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; f) the length of time for which the person is employed; g) the method of payment, whether by the time or by the job; h) whether or not the work is a part of the regular business of the employer; i) whether or not the parties believe they are creating the relation of master and servant; and j) whether the principal is or is not in business.”

M. Virginia

“The fact that an agreement is a franchise contract does not insulate the contracting parties from an agency relationship ... [i]f a franchise agreement so regulates the activities of the franchisee as to vest the franchisor with control within the definition of agency, the agency relationship arises even though the parties expressly deny it.”

107 Viado, 230 Or. App. At 546-47.